

1984 WL 249850 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 30, 1984

*1 The Honorable Irene K. Rudnick
Member
House of Representatives
Post Office Box 544
Aiken, South Carolina 29801

Dear Representative Rudnick:

Attorney General Medlock has referred your letter of March 21, 1984, to me for response. You noted that the Justice Department will not allow Senate elections to be held and that the present senators' terms expire in November. You have asked whether, if no elections are permitted by the Justice Department, senators will lawfully hold office if they remain in office past November and whether senators would be entitled to receive a salary for time served during the hold-over period.

This Office has addressed this type of situation in prior Opinions No. 3797 (June 10, 1974) and No. 2846 (March 2, 1970) (copies enclosed). As is stated in Opinion No. 2846.

Irrespective of the failure of the constitutional provision or the statute [creating the Office] to provide for holding over after the expiration of a term, it is clear from the decisions of the Supreme Court of this State that one who holds over after the expiration of his term, whether or not there is statutory provision providing for his holding over, serves in a de facto capacity, and his acts and doings in such capacity are valid and proper. The precise case is [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145, where the following appears:

'The general law is that one who holds over after the expiration of his legal term, where no provision is made by law for his holding over, is commonly regarded as a de facto officer.' ¹

See, also; [Rogers v. Coleman](#), 245 S.C. 32, 138 S.E. 2d 415 (1964); [Bradford v. Byrnes](#), 221 S.C. 255, 70 S.E. 2d 228 (1952); [Langford v. State Board of Fisheries](#), 217 S.C. 118, 60 S.E. 2d 59 (1950); and [Smith v. City Council of Charleston](#), 198 S.C. 298, 17 S.E. 2d 860 (1941); and numerous other cases. In the situation you have described, senators will be considered hold-overs and de facto officers and will continue to hold office until their successors are elected and have qualified. As is stated in [Bradford v. Byrnes](#), *supra*, 221 S.C. at 261-262, 'The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers . . . * * * As nature abhors a void, the law of government does not ordinarily countenance an interregnum.'

You have also asked whether senators would be entitled to receive a salary for time served during the hold-over period. Based upon the following discussion, it is the opinion of this Office that the holding-over senators would be entitled to receive a salary for time served during the hold-over period until their successors are elected and have qualified. In so deciding, it is noted that no other person would be claiming or having a right to claim the salary in question; the senators would not be usurpers of office by force or fraud, but would hold office under color or title; ² and they would have performed the duties of office in good faith. Based on the decision in [Elledge v. Wharton](#), 89 S.C. 113, 71 S.E. 657 (1911) and the cases cited therein, we believe that the hold-overs, as de facto officers, would be entitled to receive a salary. See also, [Langford v. State Board of Fisheries](#), *supra*, 217 S.C. at 128; [Smith v. City Council of Charleston](#), *supra*, 198 S.C. at 324-325; and [Annot.](#), 93 A.L.R. 258 at 266.

*2 In so deciding that the senators, as hold-overs or de facto officers would be entitled to receive a salary, we must supersede the inconsistent portion of Opinion No. 1125, dated June 5, 1961, which must be found to be clearly erroneous in this instance. That opinion held in part that a de facto officer would not be entitled to the emoluments of his office. That opinion apparently did not consider the decision in Elledge v. Wharton, *supra*, an annotation of which appears in 93 A.L.R. 258 at 266 for the proposition that a de facto officer may be compensated when there is no de jure officer claiming the office. That opinion did cite the annotation at page 269, on which page was cited Russell v. Lyon, 90 S.C. 5, 72 S.E. 496 (1911). Russell would be distinguishable from the instant situation as the plaintiffs in Russell did not hold office under color of title, unlike the senators who would be holding over. The remaining authority cited in that opinion was from other jurisdictions and did not consider decisions from this state's Supreme Court as cited above. Therefore, to the extent inconsistent with today's opinion, the second portion of Opinion No. 1125 is hereby superseded.

Today's opinion is limited in scope to the factual situation described in your letter. There may be instances in the future where Opinion No. 1125 and the authority cited therein are clearly valid. We would point out that in an opinion dated February 10, 1977, former Attorney General McLeod stated, 'there is authority in this State that de facto officers are entitled to the compensation attaching to the office.' When de facto officers should be compensated would best be determined on a case-by-case basis.

We trust that we have satisfactorily responded to your inquiry. If we may provide further information or clarification, please advise us.

Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

- 1 [Article III, Section 6 of the Constitution of South Carolina \(1895\)](#) provides for a term of four years for members of the Senate; no provision for holding over is made. We believe the conclusions reached in this opinion would be the same with or without such a holding-over provision, based on the authority examined by this Office.
- 2 See, 63 Am.Jur.2d, Public Officers and Employees, § 499 (Color of authority or title).

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